

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ALLAN FRED ALTERGOTT,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:04-cv-0752-LRH-VPC

ORDER

On October 27, 2005, petitioner filed a Motion for Certificate of Appealability (docket #21), which the court construes as a Notice of Appeal. Respondents have not responded to the motion. Because petitioner was permitted to proceed in *forma pauperis* in this action, he shall be permitted to maintain that status on appeal.

The court will deny petitioner's application for a certificate of appealability. The standard for the issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. §2253(c) as follows:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's

1 underlying constitutional claim, a COA should issue when the prisoner
2 shows, at least, that jurists of reason would find it debatable whether
3 the petition states a valid claim of the denial of a constitutional right
and that jurists of reason would find it debatable whether the district
court was correct in its procedural ruling.

4 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074, 1077-79 (9th
5 Cir. 2000). The court finds that petitioner has not met this standard.

6 The court finds that jurists of reason would not find debatable the court's decision as to the
7 merits of his exhausted claims or the procedural issues related to petitioner's procedurally barred
8 claims. Despite petitioner's attempts to reargue the merits of his claims, the Nevada Supreme Court
9 applied the proper legal standards and made reasonable determinations of the facts imposing a
10 deference requirement on this court under the AEDPA. Petitioner has not shown that he was
11 deprived of the effective assistance of counsel. Neither has he convinced either this court or the
12 Nevada Supreme Court that he was convicted on insufficient evidence. His claims would not inspire
13 debate among rational jurists.

14 The procedural rulings of this court are also on firm footing among rational jurists. Petitioner
15 did not attempt to overcome the procedural bar to the court's hearing certain of his claims on the
16 merits. Rather, he simply contested the state courts' findings in that regard. Here, petitioner has not
17 shown how jurists of reason might debate the procedural rulings. His arguments of actual innocence
18 are not persuasive. The certificate of appealability shall be denied.

19 **IT IS THEREFORE ORDERED** that petitioner is granted leave to proceed in *forma*
20 *pauperis* on appeal in this matter.

21 **IT IS FURTHER ORDERED** that petitioner's Motion for Certificate of Appealability
22 (docket #21) is **DENIED**.

23 Dated this 9th day of January, 2006.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE